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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NASHVILLE GAS COMPANY,
Petitioner,

v.

TENNESSEE PUBLIC SERVICE COMMISSION,
CLIFFORD ALLEN, et al.,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI**
To the Supreme Court of Tennessee

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STATEMENT

Nashville Gas Company, a wholly-owned subsidiary of Tennessee Natural Gas Lines, Inc. (App. A-129), filed a petition to increase its natural gas rates and charges with the Tennessee Public Service Commission in January and April, 1975 (App. A-87). Congressman Clifford Allen was allowed to intervene in these regulatory proceedings (App. A-88) and primarily raised the issue that the relationship between the parent, Tennessee Natural Gas Lines, Inc., and the wholly-owned subsidiary, Nashville Gas Company, must be disclosed and considered by the Tennessee Public Service Commission.

Nashville Gas Company steadfastly refused to disclose much of the requested information concerning its relationship with and to Tennessee Natural Gas Lines, Inc. but from the little information finally obtained, the Tennessee Public Service Commission concluded that:

- (1) Tennessee Natural Gas Lines, Inc. serves only four customers, all located in the Nashville, Tennessee area: Nashville Gas Company, E. I. DuPont de Nemours, Ford Motor Company, and Armstrong Tire and Rubber Company (App. A-128);
- (2) Rates charged to Nashville Gas Company by the parent are regulated by the Federal Power Commission (App. A-129);
- (3) Rates charged to the three large industrial customers are not regulated by the Federal Power Commission or anyone else and those rates are simply negotiated between the parties (App. A-129).

The question of why these two "competitors" exist side by side as parent and subsidiary relates to state law and what constituted the Nashville franchise area under state law (App. A-129). On this basis, the Tennessee Public Service Commission concluded that Nashville Gas Company was entitled to a just and reasonable rate of return, but Nashville Gas Company was also ordered to disclose the information and relationship with Tennessee Natural Gas Lines, Inc. (App. A-134-135).

Petitioner Nashville Gas Company then appealed to Chancery Court which held that the action of the Tennessee Public Service Commission with respect to the parent-subsidary issue "was beyond the scope of its authority" and therefore, reversed the action of the Commission (App. A-40, A-32-34). Respondents then appealed to the Supreme Court of Tennessee which reversed the Chancery Court on this issue and remanded the proceeding for further action. (App. A-21-A-28).

ARGUMENT

I

The Petition for Writ of Certiorari Should Be Denied Because the Requirement of Finality Is Not Met.

The Supreme Court of Tennessee decision in this case holds with reference to the parent-subsidary issue:

The decree of the Chancellor in this case is reversed insofar as it dealt with the parent-subsidary relationship, and this cause will be remanded to the Chancery Court, with directions to refer it to the Commission for the production by the Nashville Gas Company of the information ordered to be supplied by the Commission, and further consideration by the Commission after that information has been supplied. (App. A-28).

Accordingly, the petition for writ of certiorari is being sought for a decision which merely orders information to be disclosed and further review and consideration by the Tennessee Public Service Commission after such disclosure. Respondent, Clifford Allen, would submit that such a decision does not meet the requirements of 28 U.S.C. § 1257(3).

Section 1257(3) and its various predecessors—Section 237 of the Judicial Code, 28 U.S.C. § 344, rephrasing Section 25 of the Act of September 24, 1789, 1 Stat. 73, 85 c20—has repeatedly been held by this Court to permit review of a final decision of the highest court of a State. The purpose of this requirement is peculiarly appropriate to this case.

Designed to avoid the evils of piecemeal review, this reflects a marked characteristic of the federal judicial system, unlike some of the states. . . . Close observation of this limitation upon the Court is not regard for a strangling

technicality. History bears ample testimony that it is an important factor in securing harmonious state-federal relations. * * * [T]he requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up—for example, where liability has been determined and all that remains to be adjudicated is the amount of damages (citing cases) . . . *Republic Natural Gas Company v. Oklahoma*, 334 U.S. 62, 67-68 S. Ct. 972, 92 L. Ed. 1212. (Emphasis added.)

In a similar case, involving alleged confiscation of a petitioner gas company, this Court found that the decision of the Supreme Court of Missouri was not final when it affirmed a decision of the Missouri Public Service Commission, but remanded for the determination of certain factual matters. *Laclede Gas Light Company v. Public Service Commission*, 304 U.S. 398, 58 S. Ct. 988, 82 L. Ed. 1422. This Court in *Laclede* quoted with approval from the response of the Public Service Commission: "From the very nature of the various items remanded for rehearing, it is conceivable that the Commission may reach conclusions which would constitute the basis of another appeal." *Laclede Gas Light Company*, supra, 304 U.S. at 400. Certainly the same conclusion is more than possible in this proceeding, since the Tennessee Public Service Commission, in its consideration of the information to be furnished and disclosed, may make findings of fact and conclusions of law, which would themselves be open to judicial review and would conceivably result in piecemeal appellate review of the proceeding which this Court has repeatedly refused to allow.

This Court, in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 56 S. Ct. 466, 80 L. Ed. 688, has stated that the policy against premature constitutional adjudication demands that any doubts in maintaining the burden of showing jurisdiction should be resolved against jurisdiction and the burden of

establishing jurisdiction is upon petitioner Nashville Gas Company. See *Memphis Natural Gas Company v. Beeler*, 315 U.S. 649, 62 S. Ct. 857, 86 L. Ed. 1090.

There is no affirmative showing of jurisdiction in the instant petition for writ of certiorari. Petitioner Nashville Gas Company cannot establish the jurisdictional requirement of finality when the Supreme Court of Tennessee found that the Tennessee Public Service Commission believed "it did not have enough information . . . to determine the extent to which the industrial sales of the parent should be taken into account . . ." (App. A-27) and remanded for reference for a disclosure of pertinent information and further rate making proceedings thereon.

II

In the Alternative, the Petition for Writ of Certiorari Should Be Denied Because the State Court Judgment Does Not Involve Any Special or Important Federal Question of Substance Appropriate for Review.

A. Petitioner fails to show any general or widespread impact of the state court judgment.

Review should be denied because the import of the Supreme Court of Tennessee decision is peculiar to the particular facts of this case. The circumstances are unlikely to be widely duplicated where the petitioner is

- (1) a wholly-owned subsidiary of
- (2) a parent who sells only to its own subsidiary and only three large industrial customers where
- (3) all four customers are not only located in the same state but even in the same city; and

- (4) the wholly-owned subsidiary refuses to disclose the profits of its parent so as to prevent any consideration and deny any knowledge of same in the rate making proceeding; and
- (5) the parents' charges and rates to its three industrial customers are also not regulated by the Federal Power Commission; and
- (6) the parent and the subsidiary are delivering the same product in the same certificated area; and
- (7) the parent and the subsidiary are all but operated as one entity.

In light of these circumstances it is difficult for respondent, Clifford Allen, not to question the assertion of Nashville Gas Company that the state court judgment "will have continuing adverse impact" and "is not an isolated instance."

B. No important discord with applicable decisions of this Court exist in the state court judgment.

Petitioner Nashville Gas Company alleges that the decision of the Supreme Court of Tennessee is in conflict with the Natural Gas Act and the jurisdiction of the Federal Power Commission. Ironically, petitioner at page 3 quotes Section 1(b) of the Natural Gas Act (15 U.S.C. § 717(b)) which provides:

Provisions of this Act which apply to the transportation of natural gas in interstate commerce to the sale in interstate commerce of natural gas for resale for ultimate public consumption, for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, shall not apply to any further transportation or sale of natural gas, or to the local distribution of natural gas or to the facilities used for such

distribution, or to the production or gathering of natural gas.

The direct industrial sales of Tennessee Natural Gas Lines, Inc. not being for resale but for the ultimate consumption of the industrial purchasers are specifically exempted from federal regulation by the above provision of the Act and have been specifically held by this Court to be subject to state regulation.

In often-quoted language this Court has recognized the jurisdictional character of industrial sales by interstate pipeline companies as follows:

The business of supplying, on demand, local consumers, is a local business, even though the gas be brought from another state and drawn for distribution directly from interstate mains; and this is so whether the local distribution be made by the transporting company or by independent distributing companies. In such case the local interest is paramount and the interference with interstate commerce, if any, is indirect and of minor importance. *Missouri ex rel. v. Kansas Natural Gas Company*, 265 U.S. 298, 309, 44 S. Ct. 544, 68 L. Ed. 1027.

This Court has also recognized comprehensive and effective dual regulation of the natural gas industry between federal and state jurisdictions as being the governing legal principle since the passage of the Natural Gas Act in 1938. This partnership was expressed as follows in a 1947 decision of this Court:

The Natural Gas Act created an articulate legislative program based on a clear recognition of the respective responsibilities of the federal and state regulatory agencies. It does not contemplate ineffective regulation at either level. We have emphasized repeatedly that Congress meant to create a comprehensive and effective regulatory scheme, complementary in its operation to those of the states and

in no manner usurping their authority (case citations omitted) and, as was pointed out in *Federal Power Commission v. Hope Natural Gas Co.*, *supra* (320 U.S. at 610, 88 L. Ed. 349, 64 S. Ct. 281), the "primary aim of this legislation was to protect consumers against exploitation at the hands of natural gas companies." The scheme was one of cooperative action between federal and state agencies. It could accomplish neither that protective aim nor the comprehensive and effective dual regulation Congress had in mind, *if those companies could divert at will all of the cream of their business to unregulated industrial uses.*" *Panhandle Eastern Pipeline Co. v. Public Service Commission*, 332 U.S. 507, 520, 68 S. Ct. 190, 92 L. Ed. 128 (Emphasis added)

This Court recognized that effective dual regulation would not be successful if pipeline companies could skim the cream off of a distribution company's certificated area by serving the large industrial customers at unregulated rates. In footnote 19 to *Panhandle Eastern Pipeline Co. v. Public Service Commission*, *supra*, 332 U.S. at 521, this Court stated:

Over thirty-eight (38) percent of the gross revenue of the local Indiana utilities from the sale of gas is derived from service to the approximately 250 industrial consumers served by them. If service to any substantial number of the industrial users were to be taken over by appellant, the local utilities not only would suffer great losses in revenue, but would be unable to dispense with more than a trivial percentage of their plant properties. The resultant increase in unit cost of gas would lead necessarily to increased rates for the consumers served by the local companies.

Finally, even if the Supreme Court of Tennessee erred in its view of the federal statutory scheme, this Court does not grant

review where there is adequate and independent non-federal grounds for the decision. *Radio Station WOW v. Johnson*, 326 U.S. 120, 65 S. Ct. 1475, 89 L. Ed. 2092.

CONCLUSION

Respondent Clifford Allen submits that jurisdiction is lacking, since there is no final judgment, or in the alternative, submits that review should be denied since the state court judgment does not invoke any special or important federal question of substance.

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Certificate of Service

I hereby certify that I have this day served the attached Brief in Opposition to Petition for a Writ of Certiorari upon all parties required to be served by depositing in the mail, air mail postage prepaid, three (3) copies thereof to counsel for all parties before the Supreme Court of Tennessee, addressed as follows:

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